United States
Circuit Court of Appeals
For the Ninth Circuit

HARRY CRAINE,
Plaintiff in Error,

vs.

PACIFIC STEAMSHIP COMPANY, a Corporation, and OLIVER CHILLED PLOW WORKS, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court

WM. P. LORD,

ARTHUR I. MOULTON,

Attorneys for Plaintiff in Error

Produced by The Arcady Company

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STATEMENT OF THE CASE

This case arises upon a writ of error to the District Court for the District of Oregon, bringing here for review the action of that court in sustaining the demurrer of the Oliver Chilled Plow Works, a corporation, to the complaint filed against it, and Pacific Steamship Company, a corporation, by Harry Craine. Craine was a stevedore employed by the steamship company to assist in storing cargo in the hold of the ship "City of Topeka." His work required him to remain at a point in the hold of the vessel and receive cargo passed to him by the ship's appliances, and stow it in the hold. The complaint alleges that the defendant in error, the plow company, as shipper, consigned to the "City of Topeka" a shipment

of potato diggers, and that it carelessly and negligently left on one of the potato diggers a sharp knife or blade, which in making such shipments would ordinarily have been removed or boxed in. The complaint also alleged as to the plow company that it carelessly and negligently failed to notify the steamship company or the steamship company's servants of the presence of this sharp blade, and that the plaintiff in error was required to carry the potato digger across the floor of the hold of the vessel, and that while so doing his left hand was caught on the knife and his fingers cut so bady that they required amputation, to his damage.

To this complaint, which appears in the abstract, the plow company interposed a demurrer setting forth that it proposed to contend upon the trial: first, that the potato digger was not an inherently dangerous instrument; second, that it appeared from the complaint that it was the duty of the steamship company to inspect the shipment; third, that it did not appear from the complaint that the negligence of the steamship company in making the shipment in its dangerous condition was the proximate cause of the injury; and, fourth, that there was a misjoinder of parties defendant in that it does not appear that the injury was caused by the concurrent negligence of the defendants, or by any joint act of the defendants.

Without written opinion, Mr. Justice Bean sustained the demurrer, and plaintiff in error declining to

plead further, the suit was dismissed as to the plow company.

POINTS AND AUTHORITIES

I.

A shipper owes the duty to a common carrier to whom it delivers goods for shipment, and likewise to the servants of the carrier, to exercise reasonable diligence to see that the goods delivered for shipment are in reasonably safe condition to be handled by the servants of the carrier, and are free from latent or hidden dangers of which it either has notice or can be advised by the exercise of reasonable diligence.

Bamfield vs. Goole and Sheffield Transfer Co., Ltd., 2 K. B. 94, 3 N. C. C. A., 248.

2 Hutchinson on Carriers, Sec. 796-7.

Farrant vs. Barnes, 11 C. B. (N. S.) 553 8 Jur. (N. S.) 868.

Boston & Albany Car Co., vs. Shanly, 107 Mass. 568.

International Mercantile Marine Co., vs. Fels, 170 Fed. 275.

II.

One who sets in motion a dangerous appliance is liable in damages to all who are injured by it when they are lawfully dealing with it in the manner in which it

could be expected to be dealt with, whether they are dealing with it as servants of him who sets it in motion, or at his invitation, or at the invitation of another who has the right to deal with it.

Pioneer S. S. Co., vs. McCann, 170 Fed. 873.

Consolidation Coastwise Co., vs. Conley, 250 Federal, 679.

Middleton vs. Ross, 213 Federal, 6.

III.

The fact that the potato digger was a simple appliance would not take it out of the rule respecting dangerous devices, if by negligence of the plow company it was permitted to be in a dangerous condition, that is to say, in such a condition that a reasonably prudent person should have foreseen that it might inflict injury upon those lawfully coming in contact with it; and what was a dangerous condition was a question to be determined upon the trial by the jury.

Gekas vs. O.-W. R. & N. Co., 75 Ore., 243: 146 Pac. 970.

IV.

Where two persons are each guilty of a negligent act and each of the negligent acts is a part of the proximate cause of injury to a third person, the persons so guilty of negligence are joint tort feasors and may be sued

together, notwithstanding the two negligent acts may be different in nature or may be wholly disassociated one from the other. It is sufficient upon demurrer, where the complaint charges concurrent negligence if the jury may find that the negligence of either or both parties was part of the proximate cause of the injury.

Galvin vs. Brown & McCabe, 53 Oregon 598; 101 Pacific 671.

ASSIGNMENT OF ERRORS

Plaintiff above named, in connection with his petition for writ of error in the above entitled action, suggests that there was error on the part of the District Court of the United States for the District of Oregon, in regard to the matters and things hereinafter set forth, and plaintiff makes assignment of errors, as follows:

1. The Court erred in sustaining the motion for default filed by the Oliver Chilled Plow Works.

2. The Court erred in sustaining the demurrer of the Oliver Chilled Plow Works to plaintiff's amended complaint.

3. The Court erred in entering judgment in this cause in favor of the defendant Oliver Chilled Plow Works and against the plaintiff.

Each of the foregoing assignments of error is based upon the grounds and for the reason that the same is contrary to law and the decision of the Courts, and that

plaintiff's amended complaint as to the Oliver Chilled Plow Works states a cause of action against said defendant.

Wherefore, plaintiff prays that the judgment of the District Court of the United States for the District of Oregon in the above entitled cause may be reversed and that such directions may be given that full force and efficiency may inure to plaintiff by reason of the facts set out in his amended complaint filed in this cause.

ARGUMENT

The ground of the court's action in sustaining the demurrer does not appear of record and we are therefore disposed to briefly present the case upon all of the grounds asserted in the demurrer.

The general rule of liability is very clearly stated and exhaustively discussed in the English case of Bamfield vs. Goole, etc. We are not disposed to burden the court with either a lengthy quotation from that case or a rehearsal of the reasons upon which it is founded. They sufficiently appear in the separate concurring opinions of the members of the court. While in these opinions there is expressed a divergence of views upon the question whether the shipper warrants the fitness of the goods offered to be handled by the carrier and his servants, all of the members of the court agree, and therein they are sustained by all of the cases discussed in the opinion, that it is a settled proposition at common law that the shipper is liable for negligence if he fails either to make

the shipment reasonably safe, or advise the carrier of its dangerous condition. He is held liable not only to the carrier, but likewise to the servants of the carrier. We are unable to find any intelligent dissent from this proposition. In the case of International Mercantile Marine Co. vs. Fels, supra, it was said, "that it was the duty of the respondents at common law to make such disclosures is unquestionable." We think it is settled beyond debate that at common law the shipper is liable if he negligently turns over to the carrier articles which are in a dangerous condition and expose the servants of the carrier to injury, and which by reasonable inspection could have been ascertained to be in a dangerous condition, without warning the carrier of the dangerous condition of the shipment. That the servants of the carrier may invoke this liability is established in the English case cited, wherein damages were awarded to the wife of the carrier for injuries which she received; and by analogy the authorities herein cited on the subject of liability to invitees establish the proposition that the shipper is liable to all those persons whom it might reasonably foresee would be injured by coming in contact with the dangerous article. That the plaintiff was not the servant of the shipper, and that his master also owed him a duty in respect to inspection of the shipper would not relieve the shipper of the consequences of its negligence. One act of negligence never excuses another. If the shipper was negligent and therefore liable in damages, it can find no excuse in the fact that the carrier may also have been negligent. The only negligence which could operate to save the shipper harmless from

the consequences of its own act would be the negligence of the plaintiff himself. It is a settled proposition that even where the negligence of a fellow servant of the plaintiff concurs with the negligence of another to produce an injury this concurring negligence does not relieve the other.

Upon the other propositions made by the demurrer, very little authority has been cited, as it is believed that the propositions are fundamental. The contention that the negligence of the defendant was not the proximate cause of the injury because after the dangerous agency was set ni motion by the shipper the carrier may also have been negligent in failing to inspect it before it reached the plaintiff, is utterly without foundation in reason or in authority. As has already been said, the negligence of the carrier in failing to apprise itself of the dangerous condition which resulted from the negligence of the shipper, and in failing to warn its servant of that dangerous condition, could not operate to relieve the shipper of liability for its negligent act in shipping the article in a dangerous condition. If it had warned the carrier of the danger incident to handling the article then it might have been said that it was free from negligence, but since it failed to do so, it was negligent, and its negligence is actionable.

The contention in respect to misjoinder of parties is fully disposed of by the Oregon case of Galvin vs. Brown & McCabe, herein cited. The injury in this case was produced by reason of the fact that this potato

digger was passed to Craine for handling with the knives still attached and not boxed in. This act resulted primarily from the negligence of the plow company in shipping it in that condition, and secondarily from the failure of the plow company and the steamship company or either of them to warn the stevedores of its condition. These acts of negligence concurred to produce the injury, and while it may be said that the two defendants did not act together and at the same time, it is unquestionably true that the negligence of each participated in bringing about the general result. It is true that the degree of care due from them is different, inasmuch as the carrier has the right, within reasonable bounds, to assume that simple articles, usually found in a safe condition, are in their usual condition. The shipper, on the other hand, as soon as it prepares an article for shipment, is chargeable with knowledge of its condition and the degree of care to be exacted from it is proportionately higher. In this case the shipper was negligent in leaving the blades on the digger in the first place.

The contention that the article being simple in its nature and ordinarily safe there can be no liability, is directly contrary to the established rule of authority. To begin with the case cannot by any possible theory fall within what is known as the "simple tool doctrine." That was contended for in the cited case of Gekas vs. O.-W. R. & N. Co. A potato digger is neither sufficiently simple nor sufficiently well-known that the Court can pass upon its capacity for doing injury, as a matter of law. In the second place, it is often true, and was true

in this case, that negligence can change a simple and safe tool or appliance to an exceedingly dangerous one. The potato digger was entirely safe with the knife removed or covered, but was a very potent agent of destruction if shipped with the knife attached and uncovered.

The complaint is not wanting in allegations of negligence, nor in the specification of the particular acts of negligence charged, and it is respectfully submitted that the demurrer as to the plow company should have been overruled and the case should have been permitted to proceed to trial as against the shipper.

Respectfully submitted,

WM. P. LORD,

ARTHUR I. MOULTON.